

The Washington Palm, Inc. and Hotel and Restaurant Employees, Local 25, AFL-CIO, Petitioner. Case 5-RC-14055

September 14, 1994

ORDER DENYING REVIEW

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND COHEN

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel, which has considered the Employer's request for review of the Regional Director's Decision and Direction of Election (pertinent portions of which are attached). The request for review is denied as it raises no substantial issues warranting review.

APPENDIX

The Washington Palm, Inc. (the Employer) is an upscale restaurant located at 1225 19th Street, N.W., Washington, D.C., which serves a broad range of menu items, including meats, seafoods, poultry, pastas, and salads. The restaurant opened in 1972. The Employer is open for lunch Monday through Friday and for dinner 7 days a week. There are approximately 46 managerial and nonmanagerial people employed by the Employer.

Hotel and Restaurant Employees, Local 25, AFL-CIO (the Union or the Petitioner) seeks to represent a unit consisting of all nontipped employees employed in the kitchen of the Employer's restaurant, excluding all other employees, all tipped employees, office clericals, guards, and supervisors as defined in the Act. Within the unit sought by the Petitioner are the classifications of dishwashers, cooks, pot washers, pantry workers, and the lobster person, a total of approximately 16 employees. This figure includes two individuals Petitioner asserts are 2(11) supervisors. The Petitioner would exclude the employee classifications of waiters, bus employees, bartenders, and valets, as well as statutory supervisors. The Petitioner is unwilling to go to an election if a unit broader than the one sought is found to be the smallest appropriate unit.

The Employer takes the position that the unit sought by the Petitioner is inappropriate and argues that the appropriate unit should include all food and beverage employees employed by the Employer. Alternatively, the Employer contends that, at a minimum, the unit must include employees in the classifications of waiter and bus employee to the employees in the classifications sought by the Petitioner.

There is no history of collective bargaining for any of the Employer's employees involved in this proceeding, and no other labor organization seeks to represent these employees.

STIPULATED SUPERVISORS

The parties stipulated that the following persons have the authority on behalf of the Employer to hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline other employees, or responsibly direct them, and these individuals should be excluded from any unit found to be appropriate: Sang Ek, executive chef; Tommy Jacomo, general manager; Damien Palladino, assistant manager; and

Sue Whitton, the bookkeeper. Consistent with the parties' stipulation, I find that these individuals are supervisors within the meaning of Section 2(11) of the Act and are excluded from the unit.

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THE EMPLOYER'S BUSINESS OPERATION

The Employer is a fine dining, white tablecloth restaurant that is open to the public. Peak hours for lunch are between 12 p.m. and 1:30 p.m. On a typical day during that period the Employer serves approximately 220-250 meals. Peak hours for dinner are somewhat longer, starting at 7 p.m. and continuing until 9:30 p.m., during which approximately the same number of meals is served. The restaurant opens at some point after 11 a.m. on weekdays, the time that waiters and bus persons report, but it appears that customers seldom appear that early. The restaurant remains open until whatever time the service of customers is completed, which can vary, but normally ranges from 11:30 p.m. to 1 a.m. On weekends the restaurant opens for dinner at approximately 5:30 p.m.

On weekdays, kitchen employees (cooks and dishwashers) are scheduled to work on one of two shifts. There is a morning crew that works from approximately 7:30 a.m. to 3:30 p.m. The morning crew is responsible for preparing lunch. The dinner crew, which works from approximately 4 p.m. to 11:30 p.m.—1 a.m., is responsible for preparing dinner. By contrast, waiters and bus persons work a split shift, arriving at approximately 11 a.m., leaving after the completion of lunch service, at around 2:30 to 3 p.m., and then returning at 5 p.m. to handle dinner service. At night waiters typically leave at any time from 11:30 p.m. to 1 p.m. One waiter, referred to as the "late" waiter, remains on duty during the slack period between lunch and dinner and handles any customers who appear during that time. On a typical shift the Employer uses 10-11 waiters. While the Employer claims that it tries to give all of its employees 2 days off during the week, it appears that many of the kitchen employees typically work a sixth day during a week. Schedules for waiters and busboys are prepared by Assistant Manager Palladino and are posted in the kitchen near the dining room, in a separate area from that where the schedules of kitchen employees are posted. Schedules for kitchen employees are prepared by Executive Chef Ek, who posts the schedules in an area of the kitchen near his office.

Executive Chef Ek arrives at the restaurant at any time from 8 to 9:30 a.m. and he usually works to at least 8 p.m., sometimes later. Generally Manager Jacomo usually works from 10 a.m. to 10 p.m. Assistant General Manager Palladino arrives at around 9 a.m. and works to closing, which is typically midnight or later. Occasionally Palladino leaves earlier and Jacomo stays to the closing of the restaurant. Whenever the restaurant is open for customer service, either Palladino or Jacomo, if not both, are present. Usually either Jacomo or Palladino performs the function of greeting customers, though at times Whitton performs this function. Bookkeeper Whitton works from 9 a.m. to 9 p.m., though on occasion she will work to closing. No stipulated supervisor is present in the restaurant at 7:30 when day-shift kitchen employees begin arriving. Yang Kim Yan, a saute cook who possesses a key, usually opens the restaurant. Ramirez occasionally performs this function. The four stipulated

supervisors also possess keys to the restaurant, as does Kevin Rudowski, who appears to be a bartender.

During the interval in the morning when no stipulated supervisors are present in the restaurant, employees on duty perform a variety of tasks. Dishwashers clean the dining room, sweep, vacuum and clean the bar, clean the rest rooms, the foyer, and complete any cleaning that must be performed in the kitchen. Dishwashers also see that the bar is adequately stocked, a function they perform throughout the day. For performing this function dishwashers are tipped a relatively small amount, usually \$10, per week by bartenders, though the payment appears to be made somewhat irregularly. Cooks perform tasks, such as restocking supplies, cleaning, and setting work stations for the day. Food and supplies are delivered to the restaurant at various times during the day. The executive chef usually signs for these, but other employees, including nonsupervisors, sometimes perform this function. Deliveries of liquor are usually signed for by the assistant manager, but others have performed this function, including nonsupervisory employees.

THE PHYSICAL LAYOUT OF THE RESTAURANT

The restaurant consists of two principal areas, the dining room and the kitchen. The dining room contains 48 to 50 tables. There is also a bar, at which customers can order and eat food. From the table most distant from the kitchen it takes only about 30 seconds or so to walk to the kitchen. Roughly half of the dining room is located on each side of the entrance to the kitchen.

The dining room is separated from the kitchen by a passageway that is approximately 5 feet long. There is a doorway, but no door, at both ends of the passageway. The doorways are approximately 4-1/2 to 5 feet in width. Inside the passageway on the right are stored dry goods and condiments such as ketchup, mustard, and certain canned goods. Portions of the dining room are visible from the kitchen and portions of the kitchen are visible from the dining room. At the opposite end of the kitchen from the doorway is a large walk-in freezer which is used to store various food items that require refrigeration.

On the left side near the entrance to the kitchen are stations for bread, coffee, and tea. Also in this area is a computer terminal that is used both as a timeclock and as a method for waiters to enter their food orders. There is also a place in this general area where waiters maintain guest checks. A little bit further down on the left side of the kitchen is the pantry area. Salads and cold appetizers are prepared in this area. There is also a station in the pantry area with a warming oven for baked potatoes, a station for soups and creamed spinach, and a refrigerated area where desserts and ice cream are stored. Behind the pantry area is a table used for cutting and preparing food items. Also behind the pantry area are large refrigerators and other storage facilities. The pantry or cold-line consists of a stainless steel apparatus with various shelves. One shelf is located about shoulder height and about a foot or foot-and-a half above this is another shelf. These upper shelves create a window-like effect through which waiters and the pantry cook can see and communicate with each other.

Inside the kitchen immediately to the right of the doorway there is a cooler where wines are stored. A bit further to the right is the dish area, where dishwashing machines, ice ma-

chines, and glass and dishracks are located. This is the principal work station of dishwashers. At the front of the dishwashing area are shallow basins into which soiled dishes and glasses are placed by waiters and bus employees. Next to the dishwashing area is a station with ice water, ice, some silverware, and other miscellaneous supplies.

Proceeding further on the right side of the kitchen is the hot line, the areas where hot food items are prepared. The exterior of the hot line consists of stainless steel shelving units, approximately 20 feet long, with openings at the top through which waiters and cooks can see each other, communicate with each other, and on which cooks place prepared orders. Dishes and other supplies are also stacked on these shelves, as well as on lower shelves on the unit. In front of the hot line are shelves for storage of dishes and other supplies. Toward the rear of the hot line is a large role of plastic wrap that is used to prepare items that customers desire to take home. In the middle of the hot line there is an apparatus hanging from the ceiling from which numerous pots, pans, and utensils are hung. This somewhat limits the visibility between the exterior and interior for a portion of the hot line.

The hot line consists of three principal work stations. The station nearest the doorway is the broiler station. The broiler cook works in this area preparing steaks, fish, and other broiler items. Next to the broiler station is the middle station, an area where items such as fried potatoes, onion rings, cheese potatoes, and crab cakes are prepared by the middle cook, also referred to as the fry cook. Furthest down the hot line is the area where the saute chef prepares other types of items such as veal dishes, pastas, and chicken. Next to the saute area is a small lobster station. At the end of the hot line there is an aisle leading to a pot washing area consisting of large sinks. The stainless steel apparatus on the hot-line side appears to be approximately 20 feet long, about twice the length of the cold-line apparatus. The aisle separating the two lines appears to be about 6 feet wide. Along the wall on the hot-line side are various ovens, stoves, and preparation tables.

To the right of the broiler station is a bulletin board, referred to as a grease board, on which waiters write their orders. This is used to coordinate the order of preparing food items. Two other boards are kept in the kitchen. One is located near the lobster station and is used to keep track of the number and size of available lobsters. The other board is kept near the broiler station and is used to keep track of the availability of special items.

OPERATING PROCEDURES IN THE RESTAURANT

Customers are greeted and seated by the manager, assistant manager or, occasionally, by Sue Whitton. The stations handled by waiters are assigned by Jacomo, Palladino, or Whitton. After a waiter has taken an order the waiter enters the order into a computer. Usually the order is entered using the computer terminal located in the kitchen near the coffee station. After the order is entered, it is then printed out in the form of a ticket or "dupe" located next to the pantry station and the broiler station. The dupes for hot food are pulled from the printer by the broiler cook who then instructs the other cooks to prepare their portions of the order. On the pantry side, the dupe is pulled by the pantry cook who then proceeds to prepare the listed items. Once items are prepared the cooks then place the items on the shelves of the steel

units where the waiters pick them up. Depending on the item, waiters add items such as garnish, lemons, dressing, or sauce to the plate. If a customer orders a special item, the waiter punches in the notation "see server" into the computer; the waiter then proceeds to discuss the item with the applicable cook to determine if the item can be prepared. Before the waiter can inform the customer that the special item can be provided the waiter must first determine whether the kitchen is able to prepare it.

Executive Chef Ek is in charge of the kitchen. On the morning shift he serves as the broiler cook, as such he informs the middle cook and the saute cook about the items they need to prepare, a process designed to coordinate preparation of items for a table. That function is handled by the broiler cook on the dinner shift, Weerapon Ouyporn. In addition, Ek ensures that waiters and bus persons comply with the Employer's food presentation standards and kitchen procedures. For instance, if a waiter fails to place the proper garnish with an item, fails to place an underliner, on a plate or fails to retrieve prepared food orders in a timely fashion, Ek will point out the deficiency. Reprimands to waiters by Ek for this sort of deficiency are issued with some frequency. Bus employees also receive reprimands of this nature from Ek.

Waiters normally report at 11 a.m. Typically this leaves waiters from half an hour to 45 minutes to spend setting up their stations. Setting up a station involves taking any remaining dirty dishes and linen from the dining room to the kitchen, and retrieving linen, silverware, plates, and glassware and placing them on tables. Most of these supplies are obtained by waiters from an area in the kitchen near to the dishwashing work station. Waiters also prepare for customers during this setup period by filling up ice pans and bread baskets, replenishing supplies of table condiments, serving spoons and cocktail forks, and cleaning and resupplying the coffee machines, all of which requires waiters to spend some time in the kitchen. Bus employees also perform many of these functions.

In filling orders, waiters prepare certain items themselves. They scoop ice cream and cut cakes and pies, though sometimes a dessert order will require the assistance of the pantry employee, for instance if a customer wants fresh fruit or whipped cream added. Similarly, waiters prepare soup orders by ladling the soup into bowls—an exception is onion soup, which waiters obtain from the saute cook. Waiters frequently participate in the preparation of lobster orders, particularly when the customer desires to have the meat removed from the shell. When that happens the lobster man cuts the lobster and the waiter then takes it, removes the meat, and places it on a tray for serving.

An important element of a waiter's job is knowing the preparation time for various items and coordinating the preparation so that customers at a table receive their meals simultaneously. One tool used to facilitate this objective is the grease board, located near the broiler cook station. Waiters also check with the various cooks to determine the stage of preparation of various items. The preparation of meals involves a coordinated effort by both cooks and the wait staff. Waiters spend much of their work shift in the kitchen, estimated by one waiter as up to 70 percent of the time of that portion of the shift when customers are being served. At peak meal hours over half the waiters on duty can be in the

kitchen at the same time. The number of meals being prepared and the number of waiters present in the kitchen makes the coordination of activities an important element in the operation of the restaurant.

The duties performed by nonkitchen employees involve constant contact with customers. In performing their duties kitchen employees seldom, if ever, have any contact with customers. Dishwashers enter the dining area occasionally while customers are present when performing the task of restocking the bar.

WORKING CONDITIONS

There is a locker room in the restaurant that is used by both by kitchen and nonkitchen employees, though the handful of female employees change in a different area of the facility. Both kitchen and nonkitchen employees wear uniforms that consist of white jackets, white shirts, aprons, and black shoes. The jackets and aprons are supplied by the Employer. The only difference between the uniforms worn by kitchen and nonkitchen employees is in the pants: waiters, bus employees, and bartenders wear black pants, while cooks, dishwashers, and other kitchen employees wear black checked pants. All employees maintain their own uniforms at their own expense, with the exception of aprons. These are supplied by the Employer for all employees and are kept in a container in the kitchen. The aprons used by kitchen and nonkitchen employees are the same. Waiters also carry a pad, a pen, and a corkscrew, all of which they supply themselves.

The Employer provides employees with meals at two points during the day, the first at 3:30 p.m. and the second at around 5 p.m. All employees are provided with the same meal. Kitchen employees usually do not take a break to eat their meal, but rather eat while working at their work station. Waiters and bus persons sometimes eat in the kitchen and at other times eat at tables located in the back of the restaurant, which they are allowed to do as long as there are no customers in the restaurant. Kitchen employees apparently have the same privilege, but seldom if ever avail themselves of the ability to eat at tables.

Employees' work hours are recorded on the computer. All employees punch in when they arrive for work. Kitchen employees punch in on the terminal located in the kitchen while nonkitchen employees often use that terminal for the same purpose. If an employee has a problem involving pay that employee would raise the matter with Assistant Manager Palladino, who has the responsibility of preparing a payroll report. While there was testimony that the Employer tries to give all employees 2 off days every week, it appears that a majority of kitchen employees work 6 days a week. At the end of their shifts waiters check the balance of charged meals entered into the computer against customer checks. Some 95 percent of the meals at the Employer are paid by credit card. This process also allows waiters to determine the amount of tips they received during their shift. If there is a problem a waiter would bring this matter to the attention of Jacomo, Palladino, or Whitton. Waiters receive a check covering the amount they earned in charged tips from their shift on their next working day.

There is virtually no job interchange between employees who hold positions in the kitchen and those who work in the dining room. Promotions within the kitchen do occur from

time to time. Executive Chef Ek started his employment with the Employer as a dishwasher.

COMPENSATION

Kitchen employees are paid on an hourly basis and do not receive tips, with the minor exception of dishwashers, who sometimes receive \$10 a week from bartenders for performing the function of cleaning and restocking the bar. Wage rates for kitchen employees vary considerably, depending on the position. The hourly rate of the four dishwashers range from a low of \$6.68 to a high of \$7.72. The hourly rate for the one pot washer is \$7.95, while the lobster person earns \$7.80. The five pantry employees earn an amount that ranges from \$6.49 to \$8.92. The lowest paid cook earns an hourly rate of \$8.87. The two other cooks sought by the Petitioner earn \$10.68 and \$11.58, respectively. As to the two cooks the Petitioner seeks to exclude as supervisors, Ouyporn earns \$14.81 per hour and Yang Kim Yan earns \$15.93.

Earnings for waiters, bus employees, bartenders, and valets derive principally from tips. Under District of Columbia law the Employer is allowed to take a tip deduction, resulting in an hourly base pay of \$2.36 per hour for waiters, bus persons, and bartenders and of \$3.15 per hour for valets. Because of tax withholding requirements, employees in these classifications usually receive no weekly check from their hourly base rate—the amounts earned all are allocated to withholding categories. Bus employees receive a proportion of the tips received by waiters, as do bartenders. While earnings for these classifications vary by season and, for waiters, by station assignment, on average, bus employees earn \$9.02 per hour; waiters earn \$20.82 per hour; and bartenders earn \$14.89.

The Employer makes available a number of benefits for all of its employees. All full-time employees, those that work at least 25 hours a week, are eligible to participate in a health insurance plan made available by the Employer. The health plan requires a significant copayment by participating employees. Approximately 10 employees, employed in various classifications, participate in the Employer's health plan. Likewise all employees are eligible to participate in an optional life insurance plan and in a 401(k) retirement plan made available by the Employer. There are five holidays during the year when the Employer is closed. Kitchen employees are paid by the Employer for these holidays, employees whose income derives principally from tips—waiters, bus employees, bartenders, and valets—are not. Sick leave policy at the Employer is informal and somewhat haphazard. General Manager Jacomo testified that kitchen employees receive sick leave pay, but other testimony suggests this is not always the case. While the evidence shows that waiters do not receive sick leave pay, and while this suggests that bus employees, bartenders, and valets similarly do not receive this type of pay, there is no specific evidence regarding these latter three employee classifications.

The Employer also has a practice of giving out Christmas bonuses to certain employees. The amount of the bonus, the classifications of employees eligible to receive bonuses, and the identities of recipients within a classification vary from year to year, depending on factors such as the profitability of the restaurant. Kitchen employees do receive Christmas bonuses, with the amount ranging this past year from \$25 to \$500. During this past year bartenders also received bonuses,

while waiters did not. Bus employees apparently have not received such bonuses, at least not in recent years. As the principal supervisor with authority over the operation of the kitchen, Ek determines the identity of kitchen employees to receive bonuses. The Employer also holds contests, such as wine sale competitions, from time to time, but these are limited to waiters and bus employees.

Waiters do not earn any vacation benefits, but the Employer is flexible in allowing them to take time off. The same appears to be true for bus employees, bartenders, and valets. It is not clear from the record whether kitchen employees earn any vacation benefits.

HIRING, TRAINING, AND SUPERVISION

The Employer receives applications constantly. On the other hand, most of the Employer's employees are long term, there is little turnover. Applicants are required to appear in person and fill out an application. A file is started for each applicant. When a vacancy occurs the Employer will review the applications of those in whom it has some interest. Applicants for positions as a waiter, bartender, bus employee, or valet are normally interviewed by General Manager Jacomo. Applicants for a kitchen position would normally be interviewed by Executive Chef Ek. Because of the extremely high ratio between the number of applicants and vacancies, the Employer is in the enviable position of frequently being able to hire experienced individuals, usually a person with whom some current employee is well acquainted, either as a relative or as a former coworker. The Employer has a 60-day probationary period, at the end of which Executive Chef Ek, General Manager Jacomo, and Assistant Manager Palladino consult about the suitability of the new employee. In practice, this appears to be largely a formality since virtually all new employees come to the Employer already possessing the skills and attributes necessary to perform successfully in the restaurant.

It appears that employees are evaluated periodically, at irregular intervals. The process is very informal. Evaluations of dining room employees, waiters, bus employees, and bartenders are conducted by General Manager Jacomo. These employees are evaluated for their ability to handle customers and their other duties, to work with other employees, and their general attitude. Evaluations of kitchen employees, to the extent they are performed at all, are handled by Executive Chef Ek. Before the Employer may grant a pay raise, it must first obtain permission from its parent, Palm Management Company. Executive Chef Ek is consulted about and appears to have the greatest say in determining whether a raise should be sought for a kitchen employee. It appears that raises are seldom, if ever, sought for nonkitchen employees whose earnings come principally for tips. Executive Chef Ek is similarly consulted about matters such as whether additional employees are needed in the kitchen.

Members of management consult with each other about the performance of virtually all employees. Because waiters and bus employees spend a considerable portion of their worktime in the kitchen, Executive Chef Ek is consulted about their performance. Nonetheless, there is a general division of supervision between kitchen employees and dining room employees. Executive Chef Ek has the principal responsibility for supervising the work of kitchen employees.

General Manager Jacomo and Assistant Manager Palladino have that responsibility for dining room employees.

New employees receive a limited amount of training. Typically a new waiter will be trained by another waiter. Training on use of the computer is provided by any number of people. Waiters do not receive tips during their training period, which may last up to a week—they earn the minimum wage during that period. Ek does most of the training of new cooks, though other cooks might have input into the process.

There is very little evidence regarding the imposition of disciplinary measures by the Employer, possibly because the experienced nature of the work force seldom requires such action. The evidence reflects that Ek, Jacomo, and Palladino possess the authority to discipline employees. Ek sometimes reprimands waiters and bus employees when they fail to comply with standards for preparing meals to be presented to patrons. Of course, such incidents occur when waiters and bus employees are working in the kitchen. Ek would also have the principal role in disciplining kitchen employees. Regarding conduct in the dining room requiring the imposition of discipline, Jacomo or Palladino, as the two supervisors who work in that part of the facility, would be the persons to impose discipline.

AREA PRACTICES

The Petitioner represents units at four freestanding restaurants in the Washington, D.C. area. In three of those restaurants the unit consists of both tipped and nontipped employees, including most kitchen employees, waiters, and bus employees. Recognition of the Petitioner at these restaurants was extended voluntarily. At the fourth restaurant, Sam and Harry's, pursuant to a decision issued by me in Case 5-RC-13863, the Union recently gained the right to represent a unit of all nontipped employees employed in the kitchen, the same unit as the one sought in this proceeding.

Over approximately the past 20 years, the Petitioner also represented units at approximately a dozen other freestanding restaurants in the Washington area, all of which have closed. All of these units included both tipped and nontipped employees and both kitchen employees and waiters and bus employees. For a short time a number of these restaurants negotiated jointly as part of a multiemployer association.

Besides the freestanding restaurants, the Petitioner also represents employees employed in nine fine-dining establishments within hotels located in the Washington area. In these units both tipped and nontipped employees, kitchen and dining room employees, are grouped together within the unit. In a number of these instances, restaurant employees are included in the overall unit encompassing all hotel employees.

THE APPROPRIATE UNIT

The Petitioner

The Petitioner seeks a unit limited to all nontipped kitchen employees. The Petitioner contends that the petitioned-for unit is appropriate because of a number of distinctions between nontipped kitchen employees and other employees who would be included in the wall-to-wall unit advocated by the Employer. Among the factors relied on by the Petitioner in support of its position are:

(1) The significant difference in compensation structure for kitchen employees as compared to employees in classifications whose income is derived primarily from tips.

(2) The absence of contact between kitchen employees and clientele, as compared to the extensive customer contact engaged in by employees in the excluded classifications.

(3) The distinct nature of the functions performed by kitchen employees and nonkitchen employees.

(4) The lack of substantial interchange and transfers between the two groups of employees.

(5) The existence of largely separate lines of supervision.

(6) The differences in benefits that exist between employees in the two groups.

(7) The disparity in wages between employees in the two groups.

As to the issue of area bargaining practices, the Petitioner asserts that the number of represented freestanding restaurants is too small to constitute any type of pattern.

The Employer

Contrary to the Petitioner, the Employer asserts that a unit of nontipped employees working in the kitchen is inappropriate. The Employer contends that a comprehensive community of interest exists between employees in the petitioned-for unit and employees in the classifications of waiter and bus employee to require, at a minimum, the inclusion of those groups in any appropriate unit. Along with the similarities in working conditions that require this result, the Employer asserts that there exists an established area practice of combining into a single unit all nonsupervisory food and beverage employees employed in restaurants.

ANALYSIS AND CONCLUSION

Section 9(b) of the Act states that "the Board shall decide in each case whether, to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purpose of collective bargaining shall be the employer unit, craft unit, or subdivision thereof."

The statute does not require that a unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit. Rather, the Act requires only the unit be "appropriate," that is, appropriate to insure to employees in each case "the fullest freedom in exercising the rights guaranteed by this Act." *Morand Bros. Beverage Co.*, 91 NLRB 409 (1950), *enfd.* 190 F.2d 576 (7th Cir. 1951); *Parson Investment Co.*, 152 NLRB 192 fn. 1 (1965); *Federal Electric Corp.*, 157 NLRB 1130 (1966); *Capital Bakers*, 168 NLRB 904, 905 (1968); *National Cash Register Co.*, 166 NLRB 173 (1967); and *Dezcon, Inc.*, 295 NLRB 109 (1989). A union is, therefore, not required to seek representation in the most comprehensive grouping of employees unless "an appropriate unit compatible with that requested does not exist." *P. Ballantine & Sons*, 141 NLRB 1103 (1963); *Bamberger's Paramus*, 151 NLRB 748, 751 (1965); and *Purity Food Stores*, 160 NLRB 651 (1966). Moreover, it is well established that there is more than one way in which employees of a given employer may appropriately be grouped for purposes of collective bargaining. *General Instrument Corp. v. NLRB*, 319 F.2d 420, 422-423 (4th Cir. 1963), *cert. denied* 375 U.S. 966 (1964); and *Mountain Telephone Co. v. NLRB*, 310 F.2d 478, 480 (10th Cir. 1962).

While the Act does not lay down any specific standards for making unit determinations, the Board has developed a number of criteria to be applied in such cases. Foremost is the principle that mutuality of interest in wages, hours, and working conditions is the prime determinant of whether a given group of employees constitutes an appropriate unit. *Continental Baking Co.*, 92 NLRB 777, 782 (1952). The key question is whether the employees have a sufficient community of interest to be an appropriate unit. *Tidewater Oil Co. v. NLRB*, 358 F.2d 363, 366 (2d Cir. 1964), cert. denied 380 U.S. 910 (1965). As stated by the Board in *Continental Baking*:

In deciding whether the requisite mutuality exists, the Board looks to such factors as the duties, skills, and working conditions of the employees involved, and especially to any existing bargaining history. [*Continental Baking Co.*, supra at 782–783.]

The community-of-interest test also considers factors such as the degree of functional integration, *Atlanta Hilton & Towers*, 273 NLRB 87 (1984); common supervision, *Associated Milk Producers*, 250 NLRB 1407 (1970); employee skills and functions, *Phoenician*, 308 NLRB 826 (1992); interchangeability and contact among employees, *Associated Milk Producers*, supra; and general working conditions and fringe benefits, *Allied Gear & Machine Co.*, 250 NLRB 679 (1950).

Applying these principles to the instant proceeding, I find that a unit of nontipped kitchen employees is an appropriate unit for purposes of collective bargaining. A number of factors support this conclusion, including the physical layout of the restaurant, the employees' compensation systems, their fringe benefits, their separate supervision, distinct work schedules, and their job functions.

(1) A significant factor is the physical layout of the restaurant and the different areas in which the petitioned-for employees work as opposed to the other employees in the restaurant. The kitchen is separated from the dining room by a full wall. Indeed, only a relatively small portion of the dining room is visible from the kitchen. Kitchen employees work almost exclusively in the kitchen. The only exception is the very small portion of time that dishwashers spend restocking the bar. By contrast dining room employees spend a substantial part of their work period in the dining room. Indeed, it appears that bartenders and valets have little if any occasion to spend time in the kitchen. While waiters and bus employees do spend a considerable portion of their workday in the kitchen, the great bulk of their time in the kitchen is spent in an area apart from where the kitchen employees work. Thus the dishwashers work principally behind the counter at the dishwasher station, except when restocking plates. Cooks spend their worktime behind the stainless steel units that separate the food preparation areas of the kitchen from the pickup area. The pot washer works at his work station.

This physical separation underscores the distinct functions performed by the different classifications of employees. Cooks prepare food. Dishwashers wash dishes and the pot washer washes pots. Waiters and bus employees are involved in the serving of food, removal of food, and general servicing of customers. While it appears that waiters and bus em-

ployees occasionally enter behind the steel units to perform various functions, this occurs only infrequently and does not detract from the separation within the kitchen in which these various classifications perform their respective functions.

(2) A distinct compensation system also separates the petitioned-for employees from the other classification employed by the Employer. All kitchen employees are paid on an hourly basis and receive overtime pay, if applicable. Waiters, bus employees, bartenders, and valets earn the bulk of their income from tips. Dishwashers do earn a small amount from tips for their work in cleaning and restocking the bar, but the amount involved is inconsequential and is insufficient to distinguish dishwashers from other kitchen employees, who earn no tips at all. Kitchen employees are paid for the five holidays during which the Employer is closed; the tipped employees are not. The Employer holds sales contests for waiters and bus employees. There are no such contests for kitchen employees. Kitchen employees are paid weekly. Dining room employees also receive a part of their pay on a weekly basis, but at least for waiters that entire amount is usually allocated to tax deductions. The bulk of their income is paid on a daily basis in the form of a check covering the prior day's tips. Also, the Employer deducts a certain amount, as it is allowed to do by law, as a tip deduction from the pay of waiters and bartenders, resulting in a base pay that is considerably lower than the normal minimum wage. The same privilege is not extended to the Employer to nontipped kitchen employees.

Finally, there is also a general difference in the relative wage rates between nontipped kitchen employees and tipped employees. The evidence shows that waiters earn roughly \$21 per hour, while bartenders earn almost \$15 per hour. This exceeds by at least \$6 an hour the amount earned by the 4 dishwashers, the pot washer, the lobster person, the 5 pantry employees, and 1 of the cooks, 12 of the 14 employees sought by the Petitioner, or 16 employees if Ouyorn and Yang Kim Yan are included. Only the 4 bus employees have an income in the same general range as these 12 nontipped kitchen employees, and even then the bus employees earn more, on average, than any of the 12. Finally, the record shows that the Employer has dealt differently with kitchen employees than with tipped employees in deciding whether to give Christmas bonuses. While the policy on bonuses has varied from year to year, the record establishes that the Employer is more prone to give such bonuses to kitchen employees.

(3) Unlike wages, the fringe benefits, other than holiday benefits, offered to employees of the Employer are uniform. Nontipped kitchen employees are eligible for the same health insurance, retirement, and life insurance benefits as employees in tipped classifications. Overall, however, I find that the compensation scheme in the Employer's restaurant creates a significantly different interest between nontipped kitchen employees and employees in the various tipped classifications the Employer seeks to include in any appropriate unit. As the Petitioner notes in its brief, the existence of different compensation schemes affecting these two groups of employees would inject significantly different issues into bargaining: tipped employees naturally would focus on issues that affect their ability to earn tips while kitchen employees would zero in on issues related to their hourly pay rate. These contrasting concerns are a significant factor that supports a finding

that the petitioned-for unit is an appropriate one for collective bargaining.

(4) There is also a separate pattern of supervision in the Employer's facility. Supervision of kitchen employees is handled almost exclusively by Executive Chef Ek. He prepares the schedules for kitchen employees, and he would have the chief role in implementing any disciplinary measure against a kitchen employee. The Employer's other stipulated supervisors spend little, if any, time in the kitchen and are not able to oversee the work of kitchen employees.

By contrast, the Employer's general manager and assistant manager have a prominent role in the supervision of employees in the tipped classifications. Schedules for waiters are formulated by Assistant Manager Palladino and are posted in a different area of the kitchen than schedules for kitchen employees. Station assignments for waiters, a key matter in determining earnings, are made by Palladino, Jacomo and, occasionally, Whitton. Applicants for kitchen positions are interviewed by Ek, while applicants for tipped positions are interviewed by Jacomo or Palladino. While it appears that the Employer's practice in providing evaluations is erratic and while there would likely be consultation among all supervisors before a determination on a particular employee was reached, clearly Ek would have the main role in preparing an evaluation for a kitchen employee while Jacomo or Palladino would fill that function for an employee in a tipped classification.

(5) There are also different work schedules for kitchen employees and for employees in the tipped classifications. Kitchen employees work on either the morning or the dinner shift. Employees in tipped classifications work parts of both shifts, with time off in between. The Employer attempts to limit tipped employees to 5 days a week while the majority of kitchen employees work 6 days a week. And, as noted above, kitchen employees receive pay for the five holidays when the Employer is closed, employees in tipped classifications are not paid for those holidays.

(6) Another significant difference between employees in the two groups relates to the job functions they perform. Kitchen employees do not enter the dining room, do not have customer contact and do not handle money. Conversely, employees in tipped classifications generally do not cook or wash dishes. Further, there are no transfers between these groups of employees. No kitchen employee has ever been transferred to a position in a tipped classification. One dishwasher sought permission to become a bus employee and his request was refused. On the other hand, the evidence shows that it is possible for kitchen employees to advance within positions in the kitchen, as exemplified by Executive Chef Ek. There is also a certain amount of interchange among employees in tipped classifications. Indeed, it appears that bartenders sometimes work as waiters.

To be sure there is a significant amount of contact between nontipped kitchen employees and waiters, bus employees and, to a lesser extent, bartenders. The timely preparation and presentation of meals require a significant degree of coordinated effort between the two groups. Waiters speak directly to cooks about the status of orders, work in conjunction with pantry employees in preparing a number of items, such as desserts, and assist to prepare plates and platters with condiments and underlinings. During peak service periods waiters and bus employees spend a majority of their time in

the kitchen. However, the amount of direct communication is lessened by the Employer's system of having waiters enter orders into a computer terminal, which then transmits to the broiler cook and the pantry the applicable parts of the order.

In *Toffenetti Restaurant Co.*, 133 NLRB 640 (1961), the Board, in finding appropriate a separate unit of kitchen employees, emphasized the factors of the separate work functions of kitchen employees, their infrequent contact with restaurant clientele, and the absence of any substantial interchange between kitchen employees and other restaurant employees. I find these factors are present in the instant case. In addition, in *Toffenetti*, the Board also relied on the existence of an area pattern on the basis of separate kitchen units in restaurants to support its determination. In the instant case the Employer argues that unlike *Toffenetti*, the area pattern in the Washington, D.C. area supports including kitchen employees with other restaurant employees.

My review of the evidence concerning the pattern of bargaining within the Washington area does not establish a practice that precludes a finding of a separate kitchen unit. Indeed, the evidence shows that currently there are only four freestanding restaurants with represented employees. In three of the four the unit consists of some combination of kitchen and dining room employees. In the fourth, Sam and Harry's, I found appropriate a separate unit of nontipped kitchen employees and that unit was eventually certified. Such a small number of restaurants, even if all followed the same unit practice, is insufficient to constitute an established area practice.

I contrast the evidence in this proceeding with *Maxwell's Plum*, 198 NLRB 14 (1972), enf'd. 481 F.2d 75 (2d Cir. 1973), a case that dealt with the issue of area practice in the New York City area concerning craft units in restaurants. In that case the administrative law judge's determination that the area pattern in the New York City area was for kitchen employees to be represented separately was based on the practice in hundreds of restaurants, very different from the handful of restaurants the Employer can point to in the Washington, D.C. area. Even if I was to consider the defunct restaurants that had bargaining relationships with the Petitioner within the last decade or two, the total of restaurants would still number less than 20, an insufficient number in my view to constitute a meaningful area practice.

Additionally, I agree with the Petitioner that the practice in hotel restaurants is not relevant to this issue because of the common practice of including units in such sites within larger hotel units. In this regard I would note that the Board in *Toffenetti* explicitly recognized that its holding in that case pertaining to freestanding restaurants was not intended to modify the existing policy as to hotel units. Again, even if hotel restaurants were relevant to this inquiry, the total number of restaurants would still amount to a small fraction of what supported the Board's determination in *Toffenetti* and *Maxwell's Plum*.

Finally, the Board has held that where other relevant factors predominate, the factor of area practice does not render an otherwise inappropriate unit, which conforms to area practice, an appropriate one, *White Front San Francisco, Inc.*, 159 NLRB 681, 683 (1966); *Halle Bros. Co.*, 87 NLRB 369, 370 (1949), or defeat a finding of appropriateness for a unit that does not appear to conform to the prevailing area practice. *J. O. Rhude & Gilbert Corp.*, 106 NLRB 536, 538 fn.

7 (1953); and *John W. Thomas & Co.*, 104 NLRB 868, 869 fn.3 (1953). Therefore, as I noted in my decision in *Sam & Harry's*, Case 5-RC-13863, even if the area practice in Washington, D.C. was consistently to group restaurant employees in an overall unit, that factor would still not necessarily preclude a finding that a unit of kitchen employees is appropriate, especially where, as here, the primary relevant factors support a finding of the appropriateness of such a unit.

Accordingly, I find that a unit limited to nontipped kitchen employees is appropriate in this proceeding. Of course, this finding does not mean that other, larger, units of restaurant

employees, including the unit advocated by the Employer, might also constitute an appropriate unit. *General Instrument Corp. v. NLRB*, supra; *Mountain Telephone Co. v. NLRB*, supra. That is, however, a determination that I am not required to reach in this proceeding. The completely separate compensation structure, the different job functions, the significantly separate supervision, the lack of interchange between the groups of employees and the other factors enumerated above establish that the petitioned-for unit of nontipped kitchen employees is an appropriate bargaining unit. I shall therefore direct an election in that unit.